

particulars of the children concerned, their residence, education, health and financial provision and question of access. If any new term or terms are to be added then the spouses should be allowed to amend the joint petition. The court should disregard any affidavit put in by any party in an attempt to vary any of the terms of the joint petition.

The history of laws in Malaysia is a history of legal pluralism. The development of Malaysian common law involved not merely the adoption of English law but also the exercise of value judgment by the Judiciary. During the colonial period the law applicable also took into consideration the several religions, manners and usages of the various communities living in the country. The personal laws were the consequence of the general ethical concern by means of which the principles of English law were circumscribed by the realities of local conditions. In the course of time through the process of interpretation of the law by the Judges progressive restriction on the operation of the customs of these people was achieved. At the same time a body of statute law was growing up which was further to restrict these customs. In this way the legal system had allowed selective parts of the personal laws to be admitted and accepted. This selective application had produced a curious artificiality and rigidity to some areas of obligation notably family and property matters. Today, the country is trying to create national unity. With the result, the scope of personal laws must be further restricted. The reform of the marriage and divorce law is an example of this trend. Mutual divorce has now been accepted and forms part of the laws of Malaysia. Section 47 which enjoins the court "to act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings" clearly can have no application on section 52 as dissolution of marriage by mutual consent is unknown to English law. We agree, with respect, with Shankar J. that the case of *Santos v. Santos*⁽⁵⁾ cannot apply to a joint petition under section 52 of the Act. We must build up our own law on this matter.

We have expressed our view that section 57 does not apply to a joint petition under section 52 of the Act. So, there is no point contrasting section 57 and section 106 which expressly excludes section 52 of its ambit. It is only necessary to set out section 106(1) which reads:

A "No person shall petition for divorce, except under sections 51 and 52, unless he or she shall have first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties ..."

B In so far as mutual divorce is concerned, in the experience of at least two members of this Court, most cases of this nature invariably came to court as a last resort. Usually, parents, relatives and friends would do their best to effect a reconciliation between the spouses.

C The appeal before us illustrates the practical difficulty of incorporating into the form and procedure the English law principles which have no relation to the concept of divorce by mutual consent. The difficulty was further compounded by an insistence upon the application of technical rules of English law. We must ever be cautious to strike a path between excessive rigidity and excessive vacuity in our deliberation.

Appeal allowed.

E Solicitors: *C.H. Liew & Co.; Lawrence & Joseph Mahalingam & Co.*

F **ONG YAN & ANOR. v. COLLECTOR OF LAND REVENUE, ALOR GAJAH, MALACCA**

[A.C.J. (Wan Yahya J.) June 7, 1985]

[Malacca – Land Reference No. 11 of 1982]

G *Land Acquisition – Objection to amount of compensation – Below market value – Mere opinions – Comparative sales – Principles of valuation – Land Acquisition Act, 1960, ss. 8 & 38.*

H In this land reference under s. 38 of the Land Acquisition Act, 1960, the acquired land is a freehold rubber plantation about 13 acres and 9 poles in area in the Mukim of Masjid Tanah, Malacca. It is a second layer lot located off the 19 milestone Masjid Tanah/Lubok China Road. The relevant date for valuation purposes is August 30, 1979 when section 8 notification was gazetted. The question for determination is the amount of compensation. The reason advanced by the applicant is based on the compensation being lower than the market value of the acquired land at the relevant time. His case rests heavily on his opinion and that of a licensed appraiser. The respondent's case is based on values of comparative sales.

I Held: (1) in land acquisition case the burden is on the applicant to make out a *prima facie* case of inadequate award. Only when he succeeds in doing so would the res-

pondent be called upon to introduce his evidence; otherwise the applicant's case must fail and the Collector's award should stand;

(2) the findings of an expert valuer, though based on mere opinion of the value of the land constitute *prima facie* case, provided of course sound reasons are given for such opinion. It will then be open to the Collector to challenge this opinion by producing more persuasive proof on comparative sale of lands in the same neighbourhood;

(3) the valuation by the Treasury Valuer based on comparative sales is accepted in preference to the mere personal opinion of the applicant's valuer;

(4) the market value of the acquired land is determined at \$7,400.00 per acre, 14% higher than the awarded value;

(5) the applicant shall pay the costs of the application and the fees assessed at \$100.00 per day in respect of each assessor for two days.

Cases referred to:

- (1) *Kailas Chandra v. Secretary of State* 17 Cal. L.J. 35.
- (2) *Nanyang Manufacturing Co. v. The Collector of Land Revenue Johore* [1954] M.L.J. 69.
- (3) *Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co. Ltd.* [1966] 1 M.L.J. 243.
- (4) *Asst. Development Officer v. Tayaballi* A.I.R. 1933 Bom. 361, 364.

LAND REFERENCE.

Francis Ho for the applicant.

Mohamed Raus bin Shariff (State Legal Adviser) for the respondent.

Cur. Adv. Vult.

Wan Yahya J.: This matter was referred to us pursuant to an application made by the landowner under section 38 of the Land Acquisition Act, 1960. The land in question (referred to as the acquired land) is a freehold rubber plantation about 13 acres 0 Rood 9 Poles in area situated in the Mukim of Masjid Tanah, Malacca. It is a second layer lot located off the 19 milestone Masjid Tanah/Lubok China Road. Notification for intended acquisition pursuant to section 8 of the Act was gazetted August 30, 1979 and therefore that is the date relevant for valuation purposes.

The objection disclosed by the applicant in Form N is on the amount of compensation and the reason advanced on such objection is based on the compensation being lower than the market value of the acquired land at the relevant time.

I do not think it is necessary for us to go into further discussions on the meaning of market value except to reproduce hereunder the oft cited passage of Jenkins C.J. in the renowned case of *Kailas Chandra v. Secretary of State*⁽¹⁾ as follows:

A "The market value of any land may be roughly described as the price that an owner willing, and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for sale and purchase of the land."

B The next thing we had to decide was on the method of valuation to be employed in arriving at our conclusions. The five known methods of valuation are usually based on:

- (i) opinion of experts;
- (ii) costing method *i.e.* by adding to the primordial value of the land any costs of improvement and all elements of profits.
- (iii) comparative sale of lands in the neighbourhood of the acquired land;
- (iv) a number of years' purchase of the profit from the land acquired;
- (v) the residual method *i.e.* by retrocessive deduction of the cost of development and building from a built up property so as to arrive at the residual cost of the land.

E Of these recognised methods, the most frequently resorted to and certainly the best guide to a fair valuation is the comparative method — see *Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore*.⁽²⁾ With this principle in mind I shall proceed to examine the arguments advanced by the applicant and the respondent.

G The applicant's case rests heavily on the expression of opinion of the landowner himself and that of Tuan Haji Abdul Jalil, a licensed appraiser. The landowner is obviously not an expert and therefore very little weight can be attached to his opinion. Tuan Haji Abdul Jalil's opinion is contained in his report (exhibit B) in which he concludes that in the light of the location, zoning and the services available the acquired land is to be valued at \$15,000.00 per acre. Tuan Haji Abdul Jalil however produced no other evidence to support his conclusion. Needless to say the appraiser's determination of the market value in this case was based on his mere personal opinion. The report also went into considerable details on the acquired land's value as a productive rubber estate but this particular element will not render the market price of the land as an agricultural holding any higher than the compensation already paid to the applicant. Moreover, as Tuan Haji Abdul Jalil said in evidence his valuation of the land at \$15,000.00 per acre is based on potential value and not on its agricultural value.

An attempt was subsequently made to get Tuan Haji Jalil to cite several sale comparisons but the appraiser, with absolute frankness, denied that such report was put up by him and that he was relying on his own assessment of potential value without any evidence of comparative sales.

The weight and accuracy to be attached to the valuation of an expert has been lucidly expressed by Buhagiar J. in the *Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore*⁽²⁾ and by Suffian J. (as he then was) in *Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co. Ltd.*⁽³⁾ as follows:

"Estimates are undoubtedly some evidence but their value is not great as expert opinion is liable to err unless it is supported by or coincides with other evidence."

I shall now revert to the list of comparisons handed over to the Court and disclaimed by the appraiser to be the subject of his research. Uncertified documents on transaction of sale improperly produced out of the hand of a lawyer in Court do not provide authentic proof of the contents therein. Unless agreed upon by parties, either expressly or impliedly during the exchange of their reports, all transactions of land should be proved by production of certified copies of the transaction. We realised that our total rejection of these documents would result in serious privation of the applicant's case as he will be left with little or practically no evidence to support his claim. As Broomfield J. said in *Asst. Development Officer v. Tayaballi*⁽⁴⁾:

"The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate".

In land acquisition cases the burden is on the applicant to make out a *prima facie* case of inadequate award. Only when he succeeds in doing so would the respondent be called upon to introduce his evidence; otherwise the applicant's case must fail and the Collector's award should stand.

The learned Legal Adviser submitted on behalf of the respondent that on the strength of this principle I should not have called upon the Collector to produce his evidence. Although that may well happen in some cases, the position here is not quite the same. The findings of an expert valuer, though based on mere opinion of the value of the land constitute a *prima facie* case, provided of course sound reasons are given for such opinion. It will then be open to the Collector to challenge

A this opinion by producing more persuasive proof on comparative sale of lands in the same neighbourhood.

B This is exactly the approach taken by the Treasury Valuer in his report. He had, to start with, visited the acquired land soon after the acquisition was gazetted under section 8 of the Land Acquisition Act, 1960. He had taken notes of the location of property and the nature of its surrounding neighbourhood. He noted the location and undulating terrain and the cultivation of the acquired land. In particular, he noticed that cultivation consists of 22-year old rubber trees. Next he proceeded to value the land by comparing it with five other pieces of lands of more or less similar acreage in the vicinity of the acquired land.

D His first comparable sale recounted the price of \$4,000.00 per acre paid on lots 1923 and 1922 on November 20, 1978 which was about eleven months before this acquisition. The first lot was about 8 acres and like the acquired land was also the interior lot cultivated with old rubber. It is located about half a mile from the acquired land.

E The second cited transaction referred to lot 2071 which was sold for \$3,500.00 per acre in 1978 and its adjoining lot 2074 sold for \$3,750.00 in 1980.

F The third transaction which took place on April 27, 1979 relates to an eight-acre lot in Ramuan China some four miles away from the acquired lot. It was sold for \$5,000.00 per acre.

G As his fourth comparison, the Treasury Valuer cited the sale transaction of lot 2509 which was paid for \$6,583.00 on July 25, 1979. The lot has the added advantage of being a first layer lot.

H The last comparison dates back to November 15, 1978 when lot 1357 on the Masjid Tanah/Kuala Sg. Baru Road was sold for \$6,100.00.

I On the basis of these transactions cited by the Government Valuer, it would appear that the average value of the land transacted within one year of the acquisition is around \$5,000.00 per acre. Even if the average value is to be computed with the unproved transaction at \$15,000.00 per acre as contended by the applicant's counsel the average price will not exceed \$6,300.00 per acre.

In the event that our denial of the applicant's

comparative sale is unwarranted we have proceeded to consider his arguments in detail.

The applicant's supplemental contention, presented through his counsel and not his valuer, rests on the sale price of six pieces of land consisting of one 14 acre lot, two 8 acre lots, two 5 acre lots of which one was sold for \$20,000.00. The rest of the lots were transacted at \$15,000.00. The 14 acre lot is directly adjoining to the acquired land and the rest of the lots are contiguous to the last mentioned lot. Counsel contends that these are the best comparisons available since the lots are nearest and indeed one is adjoining to the acquired land. We disagree with this proposition. It must be noted that although the six lots were cited in this case, they are in truth involved in one single transaction of contiguous lots of one buyer made within minutes of each other. The transfers took place in 1981, *i.e.*, one year and seven months after the acquisition by which time prices of lands had appreciated considerably. Furthermore it is a well-known fact that buyers are inclined to pay more for contiguous lots which could be developed into a large housing estate. In this instance, the five contiguous lots when taken together will give the buyer the development potential of a 42-acre lot. Then there is also the possibility of the buyer having obtained planning permission before the sale.

I am unable to accept that the sums paid by a common buyer for six parcels of land during what in fact was a single transaction in land is a proper guideline for measuring the market value of lands. As mentioned earlier even the inclusion of this transaction to those listed by the Treasury Valuer would place the average value of the land in this neighbourhood to be around \$6,000.00 to \$6,500.00 — an amount which was awarded to the applicant. Assuming this to be the value of lands in that locality, I would give it no more than 10 to 15% increase in excess of its awarded value.

To restate shortly the above conclusions. First, I accept the valuation by the Treasury Valuer based on comparative sales in preference to the mere personal opinion of the applicant's valuer. Secondly, even if the unproved transaction provided by the appellants' counsel is to be considered, the nature of the records of dealings substantiate that the sales were in actuality a single transaction in lands. Thirdly, if I am wrong as to my previous conclusions, I did consider and find that the Treasury experts' valuation of the acquired land to be more correlative, authentic

A and acceptable to me in relation to the time, period and nature of the surrounding land than that of the applicant's citation of six parcels of land sold within minutes of each other almost two years after the acquisition. As indicated earlier, the valuation of \$6,500.00 per acre of the applicant's land appears to be more realistic to me having regard to its shape, location, size, cultivation and use at the time of acquisition. *Albeit*, bearing in mind that no comparative sales cited can perfectly designate the commensurate value of the acquired land, both the assessors and I feel that we would lean slightly in favour of the applicant to regard the acquired land as the best among equals in that locality and we therefore determined its market value at \$7,400.00 per acre, *i.e.*, almost 14% increase over and above the awarded value.

D The applicant shall pay the costs of this application including the fees assessed at \$100.00 per day in respect of each assessor for two days.

R.K. Pragasam and Ong Bun Seong, Assessors, concurred.

E *Order accordingly.*

Solicitors: S.K. Khoo & Tan Tiak Tiok.

GOH BAK TUN v. KUCHING PORT AUTHORITY

G [O.C.J. (Tan Chiaw Thong J.) May 27 & June 8, 1985]

[Kuching — Suit No. KG. 209 of 1984]

Practice and Procedure — Application to strike out and dismiss action — Parties agreed point for decision — Whether defendant an industry belonging to State Government — Whether gazetted exemption applicable — Employees' Social Security Act, 1969, ss. 2(10), 31, 42, 98 & 100 — Port Authorities Ordinance, 1961, ss. 4, 5(1), 9(6) & 11 — Sarawak Interpretation Ordinance, s. 8(1) — Interpretation Act, 1967, s. 19.

I In this case, the plaintiff had filed a writ on October 26, 1984 against the defendant claiming damages arising out of physical injuries sustained by him on November 7, 1981 in the course of his employment. The defendant applied to have the writ and statement of claim struck out and dismissed with costs. The parties had agreed that the sole point that called for decision was whether at the material time the defendant was an industry belonging to the State Government of Sarawak. By virtue of the exemption (P.U.(B) 643/1983) made by the Minister under